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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

(OAKLAND DIVISION)

KIRK KEILHOLTZ and KOLLEEN KEILHOLTZ for themselves and on behalf of those similarly situated,

Plaintiffs,

vs.

SUPERIOR FIREPLACE COMPANY; LENNOX HEARTH PRODUCTS, INC.; LENNOX INTERNATIONAL, INC. and DOES 1 through 25, Inclusive,

Defendants.

No. CV 08-00836 SI

PLAINTIFFS' POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS UNDER FEDERAL RULES OF CIVIL PROCEDURE 9(b) AND 12(B)(6)

Date: October 3, 2008
Time: 9:00 a.m.
Location: Courtroom 10

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I.

INTRODUCTION

Defendants cavalierly characterize the Class Complaint's allegations as plaintiffs' unwillingness to recognize that "fireplaces get hot." In comparing their fireplace to a kitchen appliance such as an oven, defendants themselves disclose the defect which is intrinsic in their fireplace. In fact, a kitchen oven does not get so hot as to inflict burns, let alone serious burns,

because it is designed in a manner that the enormous heat generated by the oven's interior is not transferred to the exposed exterior glass surface. Because of its double paned design, one can comfortably place their hands on the oven glass during operation without any burn or pain and, a kitchen stove is designed such that the heating elements are parallel to the floor and physically withdrawn from the hands of small children. It is this expectation of safety relating to other home appliances which lead the reasonable consumer to believe that they are adequately protected from serious injury by defendants.

Rather than kitchen appliances, the danger intrinsic in defendants' fireplace is more akin to clothes irons which are designed to reach temperatures of 400 degrees[1]. Defendants' position, logically extended, is that a consumer should reasonably expect a manufacturer to design and market a product that presents a similar, or greater, risk of severe burns as numerous irons lined, up, stacked up, and heated to the highest setting and intended to be placed or located in a family room where small children play and people socialize.

In truth, the Complaint 's averments identify specific, dramatically dangerous defects in the HAZARDOUS FIREPLACES, defendants' actual knowledge of those defects, defendants' actual knowledge of relevant safety precautions implemented by their primary competitor, defendants' unfair advantage in pricing and profit in the marketplace secondary to their conscious decision not to add safety precautions to guard against the danger, and defendants' wrongful and unlawful conduct in marketing and continuing to market the HAZARDOUS FIREPLACES without disclosing and/or warning of the ominous danger unique to their brand of fireplace.

Defendants seek dismissal of the present action, and/or one of two causes of action, on essentially four grounds. First, defendants argue that plaintiffs must, and failed to, meet the specific pleading requirements set forth in Rule 9(b) for actions involving allegations of fraud and/or misrepresentation. Defendants' second argument is that the Court must dismiss plaintiffs'

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[1]Importantly, defendants found, during performance testing of the HAZARDOUS FIREPLACES, that the front glass surface heats to over 500 degrees, Fahrenheit, in the course of normal operation. It should also be noted that even clothes irons, with top temperatures of only 400 degrees, have safety design features, e.g. automatic shut-offs, to protect against inadvertent severe burns.

Second Cause of Action, seeking damages under California's Consumer Legal Remedies Act ("CLRA") (Civil Code Section 1750 et seq) based on plaintiffs' supposed failure to provide pre-complaint notice to defendants under Civil Code Section 1780. Third, defendants claim the Court must dismiss plaintiffs' CLRA cause of action because no "transaction" existed between plaintiffs and defendants. Fourth, defendants reliance upon the statute of limitations ignores the application of the late discovery rule, their fraudulent concealment and the ongoing nature of their wrongful conduct.

Defendants' position that the Complaint must, but fails, to meet the "specific" pleading requirements set forth in Rule 9(b) for actions alleging "fraud," is without merit because the Complaint sufficiently pleads, with specificity, failure to disclose material facts and other unlawful conduct as applied to such claims under an UCL and/or CLRA action. As to defendants' argument plaintiffs did not give defendants pre-action notice under CLRA, plaintiffs and the Class have done so (in the *Fields*' California Class now stayed), and any failure to specify notice compliance can be easily remedied. Case law establishes that notice of the defects is sufficient notice. As to defendants' argument with regard to the lack of a "transaction" between plaintiffs and defendants, applicable case law under the CLRA does not support their position.

Defendants' position regarding the applicable statutes of limitations cannot support dismissal of the complaint or any of its causes of action because plaintiffs allege, factual issues exist, with respect to on-going conduct by the defendants, defendants' active concealment of the unique danger presented by the HAZARDOUS FIREPLACES, and/or delayed discovery of the unique danger presented by the HAZARDOUS FIREPLACES by the plaintiffs.

II.

PLAINTIFFS' COMPLAINT SUFFICIENTLY PLEADS DEFENDANTS' CONDUCT WITH SPECIFICITY FOR UCL AND/OR CLRA PURPOSES

Contrary to defendants' position, UCL causes of action, especially claims based on failure to disclose, do not need to meet the heightened pleading requirements set forth in Rule 9(b) because the term "fraudulent" as used in Section 17200 does not refer to the common law tort of fraud. *Saunders v. Superior Court,* 27 Cal.App.4th 832, 839 (1994).

In fact, the fraud contemplated by Section 17200 bears little resemblance to common-law fraud. *State Farm v Superior Court,* 45 Cal. App. 4th 1093, 1105 (1996) "'Unlike common law fraud, a [section 17200] violation can be shown even without allegations of actual deception, reasonable reliance and damage.' [Citation.]" *Berryman v. Merit Property Management, Inc.* 152 Cal.App .4th 1544, 1556 (2007); see also *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal.4th 26, 46-47 (1998) [fact-specific pleading requirements for common law fraud not applicable to section 17200 claims]. To state a cause of action under section 17200, it is only necessary to show that members of the public are likely to be deceived. *Committee on Children's TV v. General Foods Corp.,* 35 Cal.3d 197, 211 (1983); *Aron v. U-Haul Co. of California,* 143 Cal.App.4th 796, 806 (2006) ; *Schnall v. Hertz Corp.,* 78 Cal.App.4th 1144, 1167 (2000). A "reasonable consumer standard" applies when determining whether members of the public are likely to be deceived. *Aron, supra,* 143 Cal.App.4th at p. 806. Under this standard, unless a particular disadvantaged or vulnerable group is targeted, the deceptive business practice is judged by the effect it would have on a reasonable consumer. *Lavie v. Procter & Gamble Co.*, 105 Cal.App.4th 496, 506-507 (2003).

> "When an unfair competition claim is based on an alleged fraudulent business practice ... 'a plaintiff need not plead the exact language of every deceptive statement; it is sufficient for [the] plaintiff to describe a scheme to mislead customers, and allege that each misrepresentation to each customer conforms to that scheme.' *Committee of Children's TV, supra,* 35 Cal.3d at pp. 212-213.) The allegation 'may be based on representations to the public which are untrue, and " 'also those which may be accurate on some level, but will nonetheless tend to mislead or deceive.... A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under' " [section 17200].' *McKell v. Washington Mutual, Inc.,* 142 Cal.App.4th 1457, 1471 (2006). Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires 'consideration and weighing of evidence from both sides' and which usually cannot be made on demurrer. [Citations.]"

Linear Technology Corp. v. Applied Materials, Inc., 152 Cal.App.4th 115, 134-135 (2007).

It is important to recognize that claimants are limited to injunctive relief and/or restitution in UCL claims. *Massachusetts Mutual v. Superior Court* (2002) 97 Cal. App.4th 1282, 1288.

With respect to the CLRA, plaintiffs allege defendants knowingly failed to disclose the fact that their fireplaces presented a unique and substantial hazard, non-existent in all other similar

fireplaces on the market. In CLRA class action cases alleging non-disclosure, the materiality of the alleged undisclosed fact or facts provides the basis for determining the sufficiency of the pleading. *Massachusetts Mutual v. Superior Court* at p. 1292-1294. For instance, in *Massachusetts Mutual*, the plaintiff class alleged a CLRA cause of action based on Mass Mutual's alleged failure to disclose their intent to reduce future dividends despite selling a life insurance product designed to pay a dividend which the insured could then use to pay the premium for the life insurance product. The plaintiffs did not need to allege anything more than the undisclosed fact and that the fact was known only by the defendant in order to properly plead a CLRA cause of action because the undisclosed material fact was material enough to raise an inference of reliance, rebuttable by the defense. (Ibid) Similarly, in the present case, plaintiffs allege that defendants knew, and were the only people who knew of, and knowingly failed to disclose the unique substantial hazard presented by the HAZARDOUS FIREPLACES and that plaintiffs would not have purchased their respective homes knowing the fireplace was much less safe and significantly more dangerous than all other similar fireplaces on the market.

In general, the complaint alleges that defendants' HAZARDOUS FIREPLACES engaged in deceptive business practices by knowingly making, marketing, and selling fireplaces different and far more dangerous than fireplaces designed, manufactured, and sold by others in the industry while actively concealing the fact that their fireplaces were more dangerous and less safe. Specifically, the Complaint alleges the HAZARDOUS FIREPLACES have single pane glass, are installed in homes at a height accessible even to small children and infants, and can, under reasonably expected consumer use does, reach temperatures well in excess of that necessary to cause third degree burns even from momentary contact with the super heated glass whereas other manufacturers of similar fireplace products have for several years been selling said similar products with mandatory protective glass front guards. (Complaint, p.2, paragraph 1; p.10, paragraph 34) Furthermore, that the HAZARDOUS FIREPLACES are a dangerous and patently unsafe hazard to be used in a residence given the ability of the unguarded single pane glass sealed front to heat up to temperatures in excess of 350 degrees Fahrenheit - well in excess of a temperature necessary to cause third degree burns to skin contacting the glass even

momentarily. (Complaint, p. 5, paragraph 15)

Moreover, Defendants designed these fireplaces, which are in reality principally "ornamental" and serve no meaningful functional use at heights and in positions in family rooms which make vulnerable children and infants the HAZARDOUS FIREPLACES' most likely victims. They are aware of the extreme temperatures and continue to produce and sell HAZARDOUS FIREPLACES, claiming that they have not figured out a way to deal with the problem. Defendants have and continue to recklessly and intentionally ignore the danger they have created, failing to rectify the enormous risk by installing warnings or guards, even after receipt of plaintiffs' CLRA notice demanding such action. (Complaint, p. 10, paragraph 34)

Plaintiffs further allege "Recent studies, including a 2004 publication by the American Burn Association, memorialize the seriousness of the problem created by the HAZARDOUS FIREPLACES, recognizing: 'an alarming [15 fold] increase in the incidence of pediatric palmar burns associated with gas fireplaces[,]' concluding that 'the increasing popularity of these units places more children at risk.' Given their preeminence in the industry, and their significant market share as a manufacturer and supplier of gas fireplaces, the statistics and information which are discussed herein are directly and reasonably attributable to the defendants' conduct in designing, manufacturing, distributing, advertising, marketing, and selling its HAZARDOUS FIREPLACES." (Complaint, p. 11, paragraph 35)

It is the specifically identified significant hazard, unique to defendants' HAZARDOUS FIREPLACES and their failure to disclose and/or warn of that unique hazard, coupled with the unfair advantage defendants' gained in the marketplace secondary to reduced production costs from intentionally failing to add safety design features utilized by all their competitors, that form the basis for plaintiffs' allegations of defendants' violations of unfair business practices and consumer protection laws. That is, defendants, with knowledge of but without disclosing or warning of, or in anyway protecting against the enormous danger unique to their fireplaces, marketed and sold, and continue to market and sell, the HAZARDOUS FIREPLACES with an unfair advantage in the marketplace because defendants did not warn anyone of the unique hazard, and, their hidden ability to charge less and/or profit more than their competitors as a consequence of

secretly and intentionally failing to include safety features utilized in the industry .

III.

PLAINTIFFS' HAVE COMPLIED WITH THE PRE-LITIGATION PREREQUISITES UNDER CLRA

Plaintiffs and the Class have complied with the CLRA's pre-action notice requirement. The "pre-action notice", attached to the Declaration of Kirk Wolden, is the "pre-action-notice" upon which plaintiffs and the Class rely. (Declaration of Kirk J. Wolden, Ex. "A.") The "pre-action notice", while not specifically identifying the plaintiffs in this particular action, nonetheless is sufficient because it provides defendants with sufficient information to satisfy the reasons for the requirement of "pre-action notice".

Under the California Legal Remedies Act (CLRA), notice of an alleged violation and a demand for a remedy must be provided to the prospective defendant at least thirty days before a lawsuit is filed. Civil Code § 1782(a). The purpose of this notice requirement is to create a window period during which the defendant can remedy the violation or attempt to reach a settlement. As explained in *Outboard Marine Corp. v. Superior Court*, 52 Cal.App.3d 30, 40-41 (1975):

> The purpose of the notice requirement of section 1782 is to give the manufacturer or vendor sufficient notice of alleged defects to permit appropriate corrections or replacements. The notice requirement commences the running of certain time constraints upon the manufacturer or vendor within which to comply with the corrective provisions. The clear intent of the act is to provide and facilitate pre-complaint settlements of consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished. This clear purpose may only be accomplished by a literal application of the notice provisions.

Thus, the courts have held that there must be strict compliance with those portions of the notice requirements which are intended to ensure that the prospective defendant is provided with a thirty-day period to remedy the problem. There must be strict compliance with the requirement that the prospective defendant be given notice thirty days before the complaint is filed. *Laster v. T-Mobile USA, Inc.*, 407 F.Supp.2d 1181, 1195 (S.D.Cal. 2005). There must also be strict compliance with the requirements that the notice be given in writing and sent by certified or registered mail. *Von Grabe v. Sprint PCS*, 312 F.Supp.2d 1285, 1304 (S.D.Cal. 2003).

On the other hand, strict compliance with the notice requirements of section 1782 is *not* required as to those aspects of the notice requirement which do not affect the defendant's right to a thirty-day period in which to remedy the violation or attempt to settle. In *Kagan v. Gibraltar Savings and Loan Assn.*, 35 Cal.3d 582 (1984), the California Supreme Court held that strict compliance is *not* required with regard to the provision of section 1782(a)(1) requiring that notice be given of "the particular alleged violations" of the CLRA, or the provision of section 1782(a)(2) requiring that the notice include the relief requested. The court stated:

> While a class demand letter under the Act should set forth, as explicitly as possible, the objected-to practices, the relief requested, and the intent to file a class action should the letter's demands not be met, *failure to specifically request all of the relief to which a class may be entitled should not preclude a later action so long as the essential notice function of section 1782, subdivision (a) is achieved.*

(*Id.* at 594.) (Emphasis added.)

In *Kagan*, the Supreme Court held that, while the plaintiff's section 1782 notice did not contain specific information about the nature of the "objected-to practices" or a demand for class relief, it was nevertheless sufficient. This was because, when the section 1782 notice was combined with an earlier letter sent by the plaintiff's husband, the defendant was given sufficient information to understand the claims against it:

> In the present case, the [section 1782] demand letter, together with the letter previously sent by plaintiff's husband, served this essential notice function by setting forth objected-to practices which indicated the necessity for class relief and stating an intent to file a lawsuit should the letter's demands not be met.

(*Id.* at 594-595.)

The court added that, had the defendant taken the steps set forth in section 1782(c) to identify the members of the potential class and the nature of their claims, and attempted to settle with the class, then the letters sent by the plaintiff and by her husband would have served the purposes of section 1782:

> Had [defendant] Gibraltar met its affirmative obligation to satisfy the conditions set forth in section 1782, subdivision (c), the policy of the Act encouraging the informal and voluntary correction of consumer complaints would have been met.

(*Id.* at 595.)

Thus, the court held that strict compliance with section 1782 is required only to the extent

that it is necessary to provide the defendant with thirty days notice to allow it to resolve or settle the claims. The form of the notice need not strictly comply with the statute, so long as it provides the defendant with sufficient information from which it can discern the general nature of the alleged violations and of the relief sought.

In addition, the *Kagan* court indicated that this information need not come from the named plaintiff. As noted above, the court held that information in a letter sent by the plaintiff's *husband* could be considered as part of the section 1782 notice – even though it did not come from the plaintiff herself, and was apparently not even sent using certified mail, or following any of the other procedures set forth in section 1782(a). The court also held that should the trial court ultimately conclude that the named plaintiff was not an appropriate class representative, another plaintiff should be substituted for her – even though that new plaintiff would not have been responsible for sending any part of the section 1782 notice. (*Id.* at 596.)

Thus, *Kagan* establishes that "strict compliance" with the notice requirements of section 1782 is only required to the extent it is necessary to satisfy "the essential notice function of section 1782." Deviations from the letter of the statute are permissible, if they do not impair that essential notice function. And, since *Kagan* is a California Supreme Court case, it the final word on the interpretation of section 1782. To the extent anything in the earlier California appellate court case, *Outboard Marine*, or any of the federal cases cited by defendants could be read as contrary to *Kagan*, it is *Kagan* which this court must follow.

There can be no question, then, that the previous letter to defendant, notifying them of the HAZARDOUS FIREPLACES' defects, hazards, and problems, as well as an impending class action, satisfies the "pre-action notice" requirement. Defendants, had they met their obligations under the CLRA in response to the "pre-action notice" set forth in Exhibit A, would have identified the plaintiffs in this action as members of the class. A defendant need not receive a pre-action notice from each individual member of the class to file an action or be a member of the class. Such a requirement would be onerous and inconsistent with the purpose of a pre-action notice. The pre-action notice requirement is not a jurisdictional matter. Rather, it is required only to provide a defendant with an opportunity to take action to avoid a lawsuit. Here, defendant

received such a notice and chose not to avoid litigation. They cannot now claim specific members of the class needed to give them more notice.

Plaintiffs reference but inadvertently failed to attach the pre-action notice upon which they rely to the First Amended Complaint. To the extent the court believes it necessary that plaintiffs attach this notice or specify the notice requirements in the body of the pleading, plaintiffs can certainly do so.

Assuming arguendo plaintiffs' notice were inadequate, the question becomes whether or not dismissal of the action should be with or without prejudice. Obviously, any failing by *Keilholtz* would not work to the disadvantage of the remaining Class members. As to the Keilholtz' themselves, their good faith effort to comply with law by relying upon another consumer's notice militates strongly against the imposition of the draconian sanction of prejudicial dismissal.

IV.

A CLRA ACTION DOES NOT REQUIRE DIRECT PRIVITY WITH THE MANUFACTURER

Defendants argued and lost this point twice in the *Fields'* California Class. Attached to Kirk Wolden's Declaration as Exhibits "B" and "C" are copies of the Orders of the Sacramento Superior Court denying defendants' requested relief based on the same argument.

Defendants argue that Plaintiffs cannot state a cause of action under the CLRA because they never purchased or leased the goods at issue, glass-front fireplaces, "*directly* from" Defendants. In fact, the CLRA contains no such requirement. If it did, the CLRA would not protect consumers from any entity/person in the chain of commerce beyond the immediate seller regardless of the egregiousness of the actions of a particular entity/person in the chain of commerce and/or innocence of the immediate seller. Such an interpretation would eviscerate the purpose of the CLRA.

The CLRA was enacted in 1970 as a "nonexclusive statutory remedy for unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." The purposes of the CLRA are "to protect consumers against unfair and deceptive business practices

and to provide efficient and economical procedures to secure such protection." *Wang v. Massey Chevrolet,* 97 Cal.App.4th 856, 869 (2002). The CLRA is to be "liberally construed and applied to promote its underlying purposes." Civil Code § 1760.

The CLRA makes unlawful a variety of deceptive and unfair acts and practices, if they are "undertaken by *any person* in a transaction *intended to result or which results in the sale or lease of goods to any consumer.*" (Civil Code § 1770(a).) (Emphasis added.) Civil Code § 1780(a) provides that "[a]ny consumer who suffers any damage as a result of the use or employment *by any person* of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person . . . ." (Emphasis added.)

Defendants claim that the term "transaction," as used in the CLRA, requires an agreement directly between the consumer-plaintiff and the defendant against whom the CLRA action is brought.[2] This interpretation is contrary to the plain language of the statute. The word "transaction", within the context of Civil Code 1770(a), is not the operative language that gives rise to a CLRA cause of action. The language immediately following the word "transaction", i.e. "....intended to result or which results in the sale or lease of goods or services to any consumer" describes the circumstances subject to a CLRA cause of action. In this way, the CLRA protects consumers, as well as innocent sellers/buyers, from unlawful conduct by any person in the chain of commerce.

Even if the word transaction, as used in Civil Code Section 1770, is ascribed jurisdictional significance, the definition of the term "transaction" in the CLRA, found in section 1761(e), does not support defendants' argument. Contrary to Defendants' claims, the Legislature did not define a "transaction" as an agreement between a consumer and the defendant or the seller or lessor. Rather, the Legislature defined a "transaction" as "an agreement between a consumer and *any other person.*" Similarly, section 1780 allows a CLRA action to be brought, not only against a seller or lessor, or a person in privity of contract, but rather against "any person" who uses

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[2] A "transaction" is defined as "an agreement between a consumer and *any other person* whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement." Civil Code § 1761(e). (Emphasis added.)

methods, acts, or practices declared unlawful by section 1770.

Defendants assert that the definitions under the CLRA are "limited" and make clear that "a plaintiff cannot maintain a CLRA claim unless he or she has actually purchased or leased the goods or services at issue from the defendant." In fact, the definitions under the CLRA, are anything but limited. Indeed, they are extremely broad, permitting a consumer to bring an action against "any person" who uses methods prohibited by the CLRA. Moreover, section 1760 requires those definitions to be "liberally construed and applied" to protect consumers.

Following the plain language of the statute, the courts have made clear that a direct transaction between the consumer and the defendant is not required by the CLRA. For example, in *Hogya v. Superior Court,* 75 Cal.App.3d 122, 125-126 (1977), the plaintiff was a consumer who purchased beef from a Navy commissary. The beef had been falsely marked as "choice," rather than merely "good." The Navy had purchased the beef from National Meat Packers. The court held that the consumer was "clearly authorized" to bring an action against National Meat Packers.

Similarly, in *Chamberlain v. Ford Motor Co.,* 369 F.Supp.2d 1138, 1144 (N.D.Cal. 2005), the court held that consumers who bought used cars from third parties could bring an action under the CLRA against the manufacturer of the cars for knowingly selling defective engine parts. The court held, "Plaintiffs who purchased used cars have standing to bring CLRA claims, *despite the fact that they never entered into a transaction directly with Defendant.*" (Emphasis added.)

In light of the plain language of the statute, *Chamberlain* and *Hogya*, it is difficult to see how defendants can seriously argue that the CLRA requires a "direct" transaction between the consumer and the defendant. Defendants' effort to read the Consumers Legal Remedies Act as merely codifying a common law breach of warranty claim is plainly incongruent with the broad consumer protection provided for in the Act.

The only authority defendants have cited in support of this assertion is a single case which is not on point, *Schauer v. Mandarin Gems of California, Inc.,* 125 Cal.App.4th 949, 960 (2005). The issue in *Schauer,* was the definition of the term "consumer" in the CLRA, *not* whether a consumer must have a transaction directly with the defendant.

In *Schauer* the plaintiff was a woman who had been given an engagement ring which her

then-fiancé had purchased from the defendant jewelry store. The plaintiff contended that the quality of the ring was inferior to what the store had advertised. The court noted that the CLRA defines a "consumer" as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." The court held that because the plaintiff did not purchase the ring, she was not a "consumer" and thus lacked standing to maintain an action under the CLRA. The court stated, "[u]nfortunately for plaintiff, by statutory definition [her fiancé] Erstad was the consumer because it was he who purchased the ring." Having determined that the plaintiff was not a "consumer" under the statute, the *Schauer* court had no reason to consider whether the CLRA requires consumers to have a "direct" transaction with the defendant, and did not do so. The definition of "consumer" is not at issue in the present case. Defendants have not attempted to argue that Plaintiffs do not meet the statutory definition of consumers. Thus, *Schauer* is irrelevant to the issues raised in defendants' motion.

V.

THE STATUTE OF LIMITATIONS DOES NOT SUPPORT DISMISSAL BECAUSE PLAINTIFFS ALLEGE DELAYED DISCOVERY, ACTIVE CONCEALMENT AND AN ON-GOING COURSE OF CONDUCT

Defendants' reliance on *Snapp Associates v. Robertson*, 96 Cal.App.4th 884, 891 (2002), ignores the distinct factual differences between its facts and a case involving active non-disclosure and concealment of a substantial consumer hazard. Moreover, the same justice of the same court which authored the *Snapp* decision held in a case of fraudulent non-disclosure under the UCL that the late discovery rule should apply. *Massachusetts Mutual v. Superior Court*, 97 Cal.App.4th 1282, 1295 (2002). Even if *Snapp* did apply, because plaintiffs allege defendants actively concealed and continue to actively conceal, via denials and lack of disclosure, the unique nature of the hazard presented by their HAZARDOUS FIREPLACES, the Court does not need to decide the issue of whether delayed discovery applies to a UCL claim.

Defendants' argument that the hazard is obvious and that should somehow let them escape responsibility dose not recognize the allegations that other manufacturers design and sell safer fireplaces, and, that the HAZARDOUS FIREPLACES are unsafe for use, even with knowledge that the glass might be hot. In other words, the danger of third degree burns from momentary contact

with the single pane glass, is not so obvious when you consider all other manufacturers have a design aspect intended to eliminate that risk, and, the HAZARDOUS FIREPLACES still severely or can severely injure people, including children, regardless of knowledge of the temperature of the glass, because of its intended location of use.

VI.

IT IS PREMATURE TO JUDGE THE VALIDITY OF THE UNJUST ENRICHMENT CLAIM

In the recent case of *Falk v. General Motors Corp.*, 496 F.Supp.2d 1088 (N.D.Cal. 2007), Judge Alsop of this Court recognized the uncertainty of the law in the State of California regarding the existence for a cause of action for unjust enrichment. Finding that plaintiffs' valid UCL claim on behalf of California consumers offered redundant rights and remedies to class members, Judge Alsop essentially ruled that there was no need for and thus no reason to finally determine whether such a claim exists under California law. Here, plaintiffs' UCL claim is still under attack regarding issues such as the statute of limitations, and yet undetermined as to the extent to which the Class members are adequately protected by the UCL claim.

Adding to this uncertainty is the factual distinction between the *Falk* Class and this Class of U.S. consumers. As was held recently in the case of *In re Abbott Laboratories Norvir Anti-Trust Litigation*, 2007 WL 1689899 (N.D. Cal.), an appropriate case, a California federal court will allow class members from other states to pursue unjust enrichment claims. Issues relating to certification of a multi-state class, and what rights and remedies should be available to those non-California participants is far from resolved. The issue having been identified and noted, it is simply inappropriate at this juncture to make determinative findings regarding the availability of an unjust enrichment claim to the California or non-California Class members.

VII.

CONCLUSION

This is a case for which consumer protection and unfair business practice laws exist. The defendants were able to under sell their competitors by not implementing safe-guards to reduce the hazard of severe burns from even momentary contact with the single-pane front glass of the

HAZARDOUS FIREPLACES at the expense of their competitors not to mention the health, safety, and welfare of the consumers. Defendants should not be able to escape responsibility because they have actively concealed their unique problems from consumers or because of some rectifiable procedural issue.

Dated: September 18, 2008

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By: _____
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